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No. 96-

In The

Supreme Court of the United States

October Term, 1996

CITIZEN POTAWATOMI NATION,
a federally recognized tribe,

Petitioner,

vs.

C&L ENTERPRISES, INC.,
an Oklahoma corporation,

Respondent.

**Petition For A Writ Of Certiorari
To The Supreme Court
For The State Of Oklahoma**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether state courts violate the Indian Commerce and Supremacy clauses to the United States Constitution by rejecting federal decisional law that Indian tribes have immunity to suit in state courts even for actions on contracts executed outside of Indian country?

2. Whether a state court violates the Indian Commerce and Supremacy clauses to the United States Constitution by ignoring Supreme Court decisions to enter money judgments against an Indian tribe for an unperformed contract to build a roof on a building located on land owned by the tribe where the Indian tribe has not waived sovereign immunity and the contract is not endorsed by the Secretary of the Interior?

PARTIES TO THE PROCEEDINGS

The Petitioner (Defendant/Appellant below) is the Citizen Potawatomi Nation, a federally recognized Indian tribe, formerly known as the Citizen Band Potawatomi Indian Tribe of Oklahoma until the Tribal constitution was amended in 1996. Petitioner was identified in the state court case caption as "Citizen Band Potawatomi Tribe of Oklahoma a/k/a Citizen Band Potawatomi Indians of Oklahoma."

The Respondent (Plaintiff/Appellee below) is C&L Enterprises, Inc., an Oklahoma Corporation.

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OPINION BELOW

The Court of Civil Appeals for the State of Oklahoma (Division No. 2) filed a Memorandum Opinion affirming judgments against the Petitioner filed by the District Court for Oklahoma County. The court of appeals decision disposed of the Petitioner's appeal of those judgments other than by a published opinion. This disposition is noted at 67 Okla. Bar J. 3465 (Nov. 9, 1996). A copy of the Memorandum opinion is in the Appendix.

JURISDICTIONAL STATEMENT

The Oklahoma Court of Appeals decision was filed November 5, 1996. Petitioner's timely petition to the Oklahoma Supreme Court for review by *certiorari* was denied January 27, 1997. This petition is being filed within ninety (90) days after the entry of an order denying discretionary review. SUP. CT. R. 13.1. The Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. art. I, § 8, cl. 3.

The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

U.S. CONST. art. VI, cl. 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

25 U.S.C. § 81

No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:

First. Such agreement shall be in writing, and a duplicate of it delivered to each party.

Second. It shall bear the approval of the Secretary of the Interior and the commissioner of Indian Affairs indorsed upon it.

Third. It shall contain the names of all parties in interest, their residence and occupation; and if made with a tribe, by their tribal authorities, the scope of authority

and the reason for exercising that authority, shall be given specifically.

Fourth. It shall state the time when and place where made, the particular purpose for which made, the special thing or things to be done under it, and, if for the collection of money, the basis of the claim, the source from which it is to be collected, the disposition to be made of it when collected, the amount or rate per centum of the fee in all cases; and if any contingent matter or condition constitutes a part of the contract or agreement, it shall be specifically set forth.

Fifth. It shall have a fixed limited time to run, which shall be distinctly stated.

All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or any one else, for or on his or their behalf, on account of such services, in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom is was so paid.

STATEMENT OF THE CASE

On August 25, 1993, C&L Enterprises, Inc., ("C&L"), Respondent, signed an "Abbreviated Form of Agreement

Between Owner and Contractor" (1987 edition)[1] to construct a foam roof on a building located on land[2] owned by the Citizen Potawatomi Nation ("Potawatomi") for $85,000. This document was also signed by three of the five members of the Potawatomi Business Committee. Under the agreement, construction on the foam roof was not to begin until a "notice to proceed" was issued by the project architect. A notice to proceed with construction was never issued.

On March 14, 1994, after learning that birds had eaten holes in a foam roof at another project, the architect determined that the roof should be rubberguard, not foam. On April 19, though lacking the ability to build a rubberguard roof, C&L offered to lower the foam roof price by $6,600, allegedly signed a contract with a subcontractor who would build the rubberguard roof, and submitted an offer based on having a subcontractor perform all the work, which bid was $21,616 higher than the lowest bidder. On April 25, the low bid was accepted. Subsequently the rubberguard roof was built for $56,784.

On January 24, 1995, though C&L never initiated any work, C&L submitted the foam roof agreement to an arbitrator. Upon receiving notice of the arbitration, the

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[1] The contract form was copyrighted by the American Institute of Architects. A copy of this document was attached as Plaintiffs' Exhibit A to the petition. *See* App. 22.

[2] The building is located on land owned by the Potawatomi that has not yet been taken into trust by the United States. The land is "restricted Indian land." 25 U.S.C. § 177. As restricted Indian land, the consent of the United States is a prerequisite to alienation.

Potawatomi notified the arbitrator in writing that the Potawatomi were asserting sovereign immunity, had numerous substantive defenses to the arbitration claim including that the agreement was not endorsed as required by federal law,[3] but had no intention of waiving immunity by participating in the arbitration proceedings.

On June 30, 1995, the arbitrator entered a default award of $25,400 plus attorney's fees and costs. The arbitration award does not mention tribal sovereign immunity nor explain how the amount of the award was computed.[4]

On August 7, C&L filed suit[5] in the District Court for Oklahoma County to confirm the default arbitration award. The Potawatomi specially appeared and moved to

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[3] 25 U.S.C. § 81 requires any agreement with an Indian tribe for the payment of money "in consideration of services for said Indians relative to their lands" to have the approval of the Secretary of the Interior endorsed thereon. Absent such endorsements, an agreement is "null and void." The C&L foam roof agreement was not so endorsed.

[4] A copy of the arbitrator's award is Exhibit B to the Petition. *See* App. 51. C&L has subsequently suggested that the damages awarded by the arbitrator were based on the difference between the C&L agreement price ($85,000) and the subcontractor's price. *See, e.g.*, Answer Brief of Appellee at 2. *C&L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Okla.*, No. 86,568 (Okla. Sup. Ct. filed July 3, 1996).

[5] *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, Case No. CJ-95-5204-64 (Okla. Co. Dist. Ct. filed Aug. 7, 1995) (petition for confirmation of arbitration award). App. 18.

dismiss based on sovereign suit immunity. App. 16.[6] Without a hearing, the District Court denied the Potawatomi motion to dismiss [App. 15] and a subsequent motion for reconsideration. App. 14. These orders do not articulate any putative basis for the District Court's exercise of jurisdiction over the Potawatomi but simply state: "Overruled" and "Denied." The Potawatomi promptly sought a writ of prohibition from the Oklahoma Supreme Court.[7]

On October 27, a week after the Potawatomi filed for a writ of prohibition, the District Court entered a default judgment against the Potawatomi for $28,414.67. App. 11. Subsequently, the Oklahoma Supreme Court refused to grant a writ of prohibition[8] and the Potawatomi timely appealed to the Oklahoma Supreme Court.[9]

On March 21, 1996, C&L obtained a second default judgment from the District Court for $10,545 in attorney's fees and costs. App. 8. This judgment was also appealed. Most of the work allegedly supporting C&L's fees

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[6] In the supporting brief, the Potawatomi raised the 25 U.S.C. § 81 deficiency. *See* Brief in Support of Motion to Dismiss, at 5, n. 17 (filed Aug. 25, 1995).

[7] *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Freeman*, No. 86,401 (Okla. Sup. Ct. filed Oct. 20, 1995) (petition for writ of prohibition).

[8] *See id.* at Order, Dec. 13, 1995.

[9] The Potawatomi asserted, *inter alia*, that the District Court erred in exercising jurisdiction and in enforcing a contract not endorsed as required by 25 U.S.C. § 81. *See, e.g.*, Brief of Appellant, at 18. *C&L Enterprises, Inc. v. Citizen Band Potawatomi*, No. 86,568 (Okla. Sup. Ct. filed May 24, 1996).

was performed post judgment in other litigation.[10] Nevertheless, the trial court entered an award for all of the attorney's fees claimed by C&L.

On November 5, the Court of Appeals affirmed the District Court judgments holding that "*Hoover*[11] directly controls on the issue of tribal immunity"[12] and that the Potawatomi waived any other defects in C&L's cause of action or C&L's claim for attorney's fees by allowing judgments to be entered by default. App. 4.

The Potawatomi timely petitioned the Oklahoma Supreme Court for review by *certiorari*.[13] This petition was denied January 27, 1997. App. 6. Mandate was issued

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[10] Of the fees awarded, 72% ($7,620) were for services allegedly performed post judgment. The attorney fee judgment is patently untenable coming in a case where no contested hearings were held and judgment was entered by default. Attorney fees were 35% of the judgments entered by the District Court.

[11] *v. Kiowa Tribe of Oklahoma*, 909 P.2d 59 (Okla. 1995), *cert. denied*, 116 S.Ct. 1675 (1996).

[12] App. 3. "The *Hoover* court held that a 'contract between an Indian tribe and a non-Indian is enforceable in state court when the contract is executed outside of Indian country.' 909 P.2d at 62."

[13] The Potawatomi argued, *inter alia*, that *Hoover* did not apply because the C&L agreement was never performed and, in any event, called for performance on tribally owned land. Thus, in denying *certiorari*, the Oklahoma Supreme Court implied that *Hoover* will be so broadly construed that every tribal contract is subject to adjudication in state court, tribal sovereignty notwithstanding.

March 3, but enforcement has been stayed pending resolution of this petition. App. 5.

REASONS FOR ALLOWING THE WRIT

1. The writ should be allowed because a state court of last resort has decided an important federal question in a way that conflicts with the decisions of a United States Court of Appeals. SUP. CT. R. 10(b).

2. The writ should also be allowed because a state court has decided important questions of federal law in a way that conflicts with relevant decisions of this Court. SUP. CT. R. 10(c).

SUMMARY OF THE REASONS

1. The Oklahoma Supreme Court has held that Indian tribes are not immune from suit in Oklahoma courts based on contracts "executed outside of Indian country." This holding directly conflicts with a decision of the Tenth Circuit Court of Appeals.

2. The Oklahoma Supreme Court decision also conflicts with decisions by this Court that federal law controls Indian commerce, that tribal immunity is synonymous with the immunity of the federal government, that tribes are immune from suit in state court absent an unequivocable waiver of that immunity, and that contracts with Indian tribes affecting their lands not

endorsed by the Secretary of the Interior are null and void.

ARGUMENT

Exclusive federal control of Indian commerce has been the "supreme Law of the Land"[14] since 1789 when the Constitution replaced the Articles of Confederation. *See* U.S. CONST. art. I, § 8, cl. 3. "**The whole intercourse** between the United States and this [Cherokee] Nation is, by our Constitution, vested in the government of the United States. * * * [the acts of the State of Georgia] interfere forcibly with the relations established between the United States and the Cherokee Nation, the regulation of which, according to the settled principles of our Constitution, are committed **exclusively** to the government of the Union." *Worchester v. Georgia*, 31 U.S. (6 Pet.) 515, 562 (1832) (emphasis added). In his treatise on the Constitution, Justice Story explained that the Indian Commerce Clause was specifically enacted to eliminate the ambiguity and conflict created by a provision in the Articles of Confederation allowing states to regulate trade with Indians who were "members" of a state.[15] "The

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[14] U.S. CONST. art. VI, cl. 2. ("Judges in every State shall be bound thereby").

[15] "The United States in Congress assembled shall also have the sole and exclusive right and power of * * * regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated." ARTICLES OF CONFEDERATION, art. IX, cl. 4; 1 Stat. 4, 7.

Constitution * * * has given to Congress, as the only safe and proper depositary, the exclusive power, which belonged to the Crown in the ante-revolutionary time; a power indispensable to peace of the states, and to the just preservation of the rights and territory of the Indians." Joseph P. Story, *Commentaries on the Constitution*, ch. XVI, § 173 (New York; Harper & Brothers, 1859). The Supreme Court has recently reiterated this consistent doctrine: "If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause. This is clear enough from the fact that the states still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes." *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114, 1126, (1996).

The Potawatomi are petitioning this Court for *certiorari* because the Supreme Court of the State of Oklahoma is regulating Indian commerce in contravention of the Constitution. In Oklahoma, Indian commerce is now being regulated by the state judiciary, not by Congress. The Oklahoma judiciary is claiming jurisdiction over the Potawatomi and other Indian tribes in a manner directly in conflict with applicable federal law. In affirming the judgments below, the Oklahoma Supreme Court did not make an isolated decision based on special equity circumstances. On the contrary, the decision was consistent with the Oklahoma Supreme Court's recent pattern of exercising authority over Indian commerce in direct defiance of federal law.

Although "courts have consistently determined that the interpretation of Indian law is a matter of

federal law,"[16] Oklahoma ignores "nearly two hundred years of recognizing sovereign immunity's extra-territorial reach"[17] under federal law by labeling a tribal jurisdictional challenge a "state law question."[18] Oklahoma then answers the "state law question" relying

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[16] *Tohono O'odham Nation v. Schwartz*, 837 F.Supp. 1024, 1029 (D. Ariz. 1993) (contractor's suit for breach of contract in state court enjoined).

[17] *In re Greene*, 980 F.2d 590, 594 (9th Cir. 1992), *cert. denied*, 510 U.S. 1039 (1994).

[18] "This Court has previously held that a federal court's pronouncement on a state law question lacks the force of authority in that it cannot bind this Court." *Aircraft Equipment Co. v. Kiowa Tribe of Oklahoma*, 921 P.2d 359, 361 (Okla. 1996). *Cf. First National Bank in Altus v. Kiowa, Comanche and Apache Intertribal Land Use Committee*, 913 P.2d 299, 301 (Okla. 1996) ("Oklahoma contract and conveyancing law, rather than tribal [sic] law, governed settlement of the dispute."). Had the question been defined as "federal law," the result would probably have been different. *See Phillips v. Williams*, 608 P.2d 1131, 1135 (Okla. 1980) ("While the pronouncement on a federal-law question by an inferior federal court is not necessarily binding on us, it is indeed highly persuasive."); *McLin v. Trimble*, 795 P.2d 1035, 1038 (Okla. 1990) (" * * * the Supremacy Clause imposes on state courts a constitutional duty 'to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected.' * * * "). *See also id.* at 1047 (Opala, V.C.J., dissenting): "[W]e follow, as a matter of comity, the Tenth Circuit opinions on substantive federal law and that court's constitutional jurisprudence applicable to the states. * * * The voluntary deference we pay to our circuit's pronouncements prevents federal law from being dichotomized within the State of Oklahoma into different bodies of legal norms – that applied in Oklahoma courts and that which governs federal courts sitting within this state."

on inapt analogies to Supreme Court opinions[19] and on unsoliticited paternalism.[20]

The effect of this judicial usurpation has been a proliferation of litigation in federal courts initiated by Indian tribes seeking vindication of Constitutionally protected rights.[21] Despite tribal success in federal

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[19] The analogies are to cases construing states' taxing powers outside of Indian country [*Hoover* at 61] and to cases holding that the Constitution does not prohibit "a state's exercise of jurisdiction over sovereign sister states." *Id.* at 62. The Ninth Circuit explains why these cases are not analogous to tribal suit immunity. "[A]pplication of the pre-emption analysis is limited to situations where the state itself is seeking to tax or regulate conduct on the reservation. If there is no attempted state action, there is nothing to be pre-empted. * * * Tribal immunity from suit arises from the Government's recognition that Indian tribes possess the attributes of a common law sovereign, and neither pre-emption nor dependent status analyses have been stated by the Supreme Court to affect that status." *In re Greene*, 980 F.2d at 596. "[T]he [New Mexico court in *Padilla*] should have looked at the scope of tribal immunity under federal law, rather than the extent of comity afforded under state law." *Id.* at 595.

[20] If Oklahoma Courts do not exercise jurisdiction over suits against tribes, "tribes would have difficulty finding anyone willing to risk his funds in unenforceable obligations. Such a rule would chill tribal commercial and entrepreneurial business." *Aircraft Equipment Co.*, 921 P.2d at 362.

[21] *See, e.g., Citizen Band Potawatomi v. Freeman*, No. CIV-95-1967-T (W.D. Okla. Aug. 6, 1996) (order dismissing complaint on abstention grounds), *appeal docketed*, No. 96-6279 (10th Cir. Aug. 21, 1996). *See also C&L Enterprises, Inc. v. Citizen Band Potawatomi*, CIV-96-0144-T (W.D. Okla. Jan. 26, 1996) (removed garnishment action remanded); *C&L Enterprises, Inc. v. Citizen Band Potawatomi*, CIV-96-0879-C (W.D. Okla. June 4, 1996) (removed asset hearing remanded).

litigation,[22] the Oklahoma Supreme Court has not tempered[23] its campaign to create an Indian commerce jurisprudence completely at odds with federal law. As a result of Oklahoma's decisions, Indian tribes in Oklahoma must continually bring expensive litigation in federal courts, Indian commerce is disrupted, and the very existence of tribes and their assets[24] are threatened. The Oklahoma judiciary has clearly stated that its judicial usurpation can only be stopped by this Court: "We follow the jurisprudence of *Hoover* and *Lewis* [*v. Sac and Fox Tribe of Okla.*, 896 P.2d 503 (Okla. 1994), *cert. denied*, 116 S.Ct. 476 (1995)] because in both cases certiorari was denied by the Supreme Court of the United States.[25] It is only

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[22] *See, e.g., Seneca-Cayuga Tribe of Oklahoma v. State of Okla. ex rel. Thompson*, 874 F.2d 709 (10th Cir. 1989) (enforcement of state court action against tribe enjoined, affirmed). *Compare State ex rel. May v. Seneca-Cayuga Tribe of Okla.*, 711 P.2d 77 (Okla. 1985) (dismissal of state district court action against tribe, reversed).

[23] Compare New Mexico. *See* note 28. Even though New Mexico subsequently modified its case law, Oklahoma continues to rely on the earlier New Mexico decision. *See, e.g.*, App. 3.

[24] After judgment was entered, C&L brought a post judgment garnishment action against a bank holding Potawatomi monies including federal funds being managed by the Potawatomi. The Oklahoma District Court rejected all claims that these assets were exempt from garnishment. Thus, Oklahoma is not only ignoring federal law on tribal suit immunity, it is also ignoring federal law on tribal asset immunity. *Cf. Maryland Cas. Co., v. Citizens National Bank of West Hollywood*, 361 F.2d 517, 521 (5th Cir. 1966) ("tribe was immune from garnishment proceeding.").

[25] A third petition for *certiorari* seeking review of *Hoover*'s progeny is pending in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, No. 96-1037 (U.S. Sup. Ct. filed Dec. 23, 1996).

when we are without the guidance of that Court we may choose to follow circuit court case law. * * * given the fact that the Supreme Court of the United States has chosen not to grant certiorari to review either the *Hoover* or *Lewis* opinions, we decline to follow the reasoning of the 10th Circuit." *Aircraft Equipment Co.*, at 361-62.[26]

Unfortunately, a sad part of this nation's history is that states, when not restrained by the federal government, have sought (sometimes successfully) to confiscate Indian lands and other assets for the benefit of non-Indians. The Oklahoma Supreme Court seems determined to continue this regrettable tradition.

Proposition 1. Oklahoma has decided an important federal question that conflicts with a decision of the Tenth Circuit Court of Appeals.

The Court of Appeals affirmed the judgment for C&L on the basis of *Hoover* which held that Indian tribes are not immune from suit in Oklahoma District Courts for contracts "executed outside of Indian country." *Id.* at 60. This decision directly conflicts with a decision of the Tenth Circuit that tribal commercial activity outside of Indian country does not affect tribal sovereignty.

See also 1996 WL 757410, 65 USLW 3468; 117 S.Ct. 1241 (Mem), 65 USLW 3629.

[26] The dissent notes that "the Supreme Court has held 'denial of writ of certiorari imports no expression of opinion upon the merits of the case' *Teague v. Lane*, 489 U.S. 288, 296 * * * (1989)." *Aircraft Equipment Co.*, at 363 (Summers, J., dissenting).

> [W]e do not believe that the location of the commercial activity is determinative. * * * we * * * conclude that the extra-territorial nature of these transactions does not strip the Nation [an Indian tribe] of its right to assert sovereign immunity. * * * Without an explicit waiver, the Nation is immune from suit in state court – even if the suit results from commercial activity occurring off the Nation's reservation.

Sac & Fox Nation v. Hanson, 47 F.3d 1061, 1064-65 (10th Cir. 1995), *cert. denied*, 116 S.Ct. 57 (1995). The Oklahoma Supreme Court has acknowledged this conflict between its decisions and those of federal circuit courts. "[Holdings by this Court that tribes waive sovereign immunity when engaging in commercial activity outside of Indian country] directly contradicts the United States Court of Appeals for the Tenth Circuit's recent decision in *Sac & Fox Nation v. Hanson*." *First National Bank in Altus*, 913 P.2d at 301 (Kauger, V.C.J. dissenting). *See also Aircraft Equipment Co.*, 921 P.2d, at 362 (Summers J., dissenting) ("I dissent because the majority opinion contravenes the mainstream of contemporary sovereign immunity jurisprudence. It is certainly contrary to *Sac & Fox Nation v. Hanson*").[27]

Sac & Fox Nation v. Hanson is consistent with virtually all courts[28] that have examined this issue. *See, e.g., Maryland*

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[27] The Chief Judge of the Tenth Circuit has also remarked on this conflict: "two cases [decided by the Oklahoma Supreme Court] directly conflict with a Tenth Circuit case which established that a tribe is immune from being sued even if it arises from commercial activity outside of Indian country." *See* Kelly Kurt, *Judge Reviews Year in Indian Law*, THE DAILY OKLAHOMAN, June 5, 1996, at 13, *available in* 1996 WL 5315306.

[28] This fact has been noted by a dissenting Oklahoma justice. *See Aircraft Equipment Co.*, 921 P.2d at 362-63. (Summers,

Cas. Co., 361 F.2d at 521; *In re Greene*, 980 F.2d at 594 ("Since only Congress can limit the scope of tribal immunity, and it has not done so, the tribes retain the immunity sovereigns enjoyed at common law, including its extra-territorial component."); *Federico v. Capitol Gaming International, Inc.*, 888 F.Supp. 354 (D.R.I. 1995); *Elliott v. Capital International Bank & Trust, Ltd.*, 870 F.Supp. 733, 735 (E.D. Tex. 1994); *Romanella v. Hayward*, 933 F.Supp. 163, 167 (D.Conn. 1996) ("tribe's immunity from suit extends to commercial activities occurring off the reservation"); *Seminole Tribe of Florida v. Houghtaling*, 589 So.2d 1030, 1032 (Fla. App. 1991) (tribe "immune from suit despite its involvement in a commercial enterprise"), *aff'd*, 611 So.2d 1235 (Fla. 1993); *North Sea Products Ltd. v. Clipper Seafoods Company*, 92 Wash.2d 236, 595 P.2d 938 (1979).

The Ninth Circuit has held that tribal immunity barred an adversary action by a bankruptcy trustee to recover a preference received by an enterprise wholly owned and managed by the Yakima Indian Nation. The Ninth Circuit acknowledged the problems created by tribal commercial activities outside the reservation. However, after reviewing state and Supreme Court decisions,

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J., dissenting). New Mexico was an exception, but, after *Sac & Fox v. Hanson* was decided, modified its holding. *See Padilla v. Pueblo of Acoma*, 754 P.2d 845, 850 (N.M. 1988), *cert. denied*, 490 U.S. 1029 (1989) (New Mexico has jurisdiction over "off reservation" business conduct). *Compare De Feo v. Ski Apache Resort*, 904 P.2d 1065, 1068 (N.M. App. 1995) (citing *Sac & Fox Nation v. Hanson*, "reject plaintiff's contention that tribal sovereign immunity does not exist when the tribe engages in commercial activity"), *cert. denied*, 903 P.2d 844 (1995).

the Ninth Circuit concluded that the Supreme Court's concern for promoting tribal economic opportunities required the conclusion that tribal sovereignty "does not stop at the reservation's boundaries."[29]

> Subjecting a sovereign entity to suit without its consent necessarily interferes with the sovereign's ability to manage its own affairs and maintain control over its public funds, territories, and peoples. As the Supreme Court has observed, a tribe's immunity from suit "is a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 890, 106 S.Ct. 2305, 2313, 90 L.Ed.2d 881 (1986).

Federico, 888 F.Supp. at 356.

> It is in such enterprises and transactions that the Indian tribes and the Indians need protection * * * to construe the immunity to suit as not applying to suits on liabilities arising out of private transactions would defeat the very purpose of Congress in not relaxing the immunity,

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[29] *In re Greene*, 980 F.2d at 598. *See also* William V. Vetter, "Doing Business with Indians and the Three 'S'es: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction," 36 ARIZ. L. REV. 169 (1994). "The Ninth Circuit's opinion, and Judge Rymer's concurring opinion, note the distinction between the sovereign immunity rules applied to tribes and those applied to state and foreign governments. Both opinions indicate that the rules applied to tribes are similar to the older, more protective rules that used to apply to other governments. Similar conclusions were reached by Justice Stevens in his concurring opinion in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 514-516 (1991)." *Id.* at 173 (citing 980 F.2d 590 at 598).

> namely, the protection of the interests and property of the tribes and the individual Indian.

Maryland Cas. Co., 361 F.2d at 521-22.

Proposition 2. Oklahoma has decided an important federal question that conflicts with decisions of the Supreme Court.

The decision by the Oklahoma Supreme Court to affirm nearly $40,000 in default judgments against the Potawatomi conflicts with applicable decisions by this Court construing the Indian commerce clause, tribal immunity, and 25 U.S.C. § 81.

a) *Tribal immunity is consistent with federal immunity which applies even to activities outside federal lands.*

Tribal immunity is construed *in pari materia* with federal immunity. States do not have jurisdiction over the federal government when the federal government engages in business activities off of federal lands.[30] A territorial limitation on the concept of governmental immunity would emasculate the doctrine.

> Indian Nations are exempt from suit without congressional authorization. It is as though the immunity which was theirs as sovereigns

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[30] *Cf. United States v. Mitchell*, 445 U. S. 535, 538 (1980). "It is elementary that '[t]he United States, as sovereign, is immune from suit save as it consents to be sued . . . , and the terms of its consent to be sued in any court define that court's jurisdiction to entertain suit' * * * in the absence of clear Congressional consent, then, 'there is **no jurisdiction** in the Court of Claims more than **in any other court** to entertain suits against the United States.'." (emphasis added).

> passed to the United States for their benefit, as their tribal properties did. Possessing this immunity from direct suit, we are of the opinion it possesses a similar immunity from cross-suits.

United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 512-513 (1940).

Nothing in this Court's decisions on suit immunity implies a territorial limitation. In fact, the opposite can be inferred.

> The sovereignty possessing immunity should not be compelled to defend against cross-actions away from its own territory or in courts, not of its own choice, merely because its debtor was unavailable except outside the jurisdiction of the sovereign's consent. This reasoning is particularly applicable to Indian nations with their unusual governmental organizations and peculiar problems.

Id. at 513.

b) *States have jurisdiction over Indian tribes **only** when the tribe has made a clear and unequivocal waiver of immunity.*

In finding jurisdiction over Indian tribes for commerce outside of Indian country, Oklahoma is essentially inferring a waiver of tribal immunity that is contrary to consistent decisions by the United States Supreme Court holding that tribal immunity from suit cannot be inferred but must be unequivocally expressed. An agreement which – if performed – would call for the construction of a roof on tribal property cannot possibly meet this standard of an "unequivocally expressed" waiver of sovereign immunity. *Puyallup Tribe, Inc. v. Department of Game*

of State of Wash., 433 U.S. 165, 172 (1977) ("absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe"); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978) (absent an unequivocal waiver, tribes are immune from suit in state court); *Oklahoma Tax Commission v. Citizen Band Potawatomi*, 498 U.S. at 509-10 (absent a waiver of immunity, Oklahoma has no jurisdiction over Potawatomi).

A tribe's waiver of suit immunity "cannot be implied but must be unequivocally expressed." *United States v. Testan*, 424 U.S. 392, 399, 96 S.Ct. 948, 953-54, 47 L.Ed.2d 114 (1976) (quoting *United States v. King*, 395 U.S. 1, 4, 89 S.Ct. 1501, 1503, 23 L.Ed.2d 52 (1969)).

c) *Contracts relative to Indian lands are null and void absent endorsement by the Secretary of the Interior.*

25 U.S.C. § 81 makes any contract with an Indian tribe "relative to their lands" null and void unless properly endorsed by the Secretary of the Interior. The C&L agreement was to construct a roof on a building located on land owned by the Potawatomi. C&L performed no construction nor provided any services to the Potawatomi. However, had the contract been performed, C&L's services would clearly have been "relative to" Indian lands.

In *Green v. Menominee Tribe of Indians in Wisconsin*, 233 U.S. 558 (1914), this Court held that a contract with an Indian tribe not endorsed with the approval of the Secretary of the Interior was null and void. The effect of the Oklahoma decision affirming judgments against the Potawatomi is to give validity to an agreement null and

void under federal law. Neither the arbitrator nor the Oklahoma courts attempted to justify or explain their enforcement of the C&L agreement despite the lack of Secretarial endorsement. However, C&L has argued that Secretarial approval was not necessary because the land where the contract would have been performed is not *trust* land, but merely *restricted* Indian land. This distinction is contrary to federal jurisprudence.

> Defendants contend that 25 U.S.C. § 81 pertains only to "tribal land" which they define as being limited to land that is part of the Tribe's reservation. However, they have cited no authority in support of that interpretation. Moreover, such a construction appears to be at variance with both the plain language of the statute and with its broad remedial purpose. Thus the statute uses the term "their [the Indians'] lands" without differentiating between original tribal lands and those subsequently acquired. Reading into those words the limitation urged by Defendants would distort their plain meaning. Moreover, it also would emasculate the statute and frustrate its purpose by providing a mechanism to regulate Indian land transactions. Indeed, it has been said that the Indian Non-Intercourse Act, 25 U.S.C. § 177, a statute having a similar objective, applies to lands acquired by tribes through purchase as well as through other means. *Alonso v. United States*, 249 F.2d 189, 196 (10th Cir. 1957), *cert. denied*, 355 U.S. 940, 78 S.Ct. 429, 2 L.Ed.2d 421 (1958).

Narragansett Indian Tribe v. Ribo, Inc., 686 F.Supp. 48, 51 (D.R.I. 1988).

CONCLUSION

This Court should grant the petition for *certiorari*, reverse the judgment for the Respondent, and remand this case with instructions to dismiss same for lack of jurisdiction.

Respectfully submitted,

MICHAEL MINNIS, OBA #6251*
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* *Counsel of Record*

IN THE COURT OF CIVIL APPEALS
STATE OF OKLAHOMA
DIVISION 2

C&L ENTERPRISES, INC., an Oklahoma corporation, Appellee,	)	
vs.	)	No. 86,568
THE CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA a/k/a CITIZEN BAND POTAWATOMI INDIANS OF OKLAHOMA, Appellant.	)	NOT FOR PUBLICATION

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

Honorable Leamon Freeman, Trial Judge

John Mashburn
James Carlton, Jr.
Garvin, Agee, Carlton & Mashburn
Oklahoma City, Oklahoma — For Appellee

Michael Minnis
David McCullough
Michael Minnis & Associates, P.C.
Oklahoma City, Oklahoma — For Appellant

MEMORANDUM OPINION

(Filed Nov. 5, 1996)

STUBBLEFIELD, J.

This is an appeal by a federally recognized Native American tribe – The Citizen Band Potawatomi Indian Tribe of Oklahoma – from judgment of the district court confirming an arbitration award in a roofing contract dispute regarding non-trust, off-reservation property. Based on our review of the record on appeal and applicable law, we affirm.

In August 1993, the Citizen Band Potawatomi Indian Tribe (Tribe) entered into a contract with C&L Enterprises, Inc., (C&L) for C&L to construct a roof on a building being built by the Tribe. The record indicates that the construction was a commercial endeavor by the Tribe – the Tribe had purchased the land from First Oklahoma Bank some four months earlier and was constructing on the property what the contract designated "The Building for The First Oklahoma Bank."

After execution of the contract with C&L, the Tribe apparently decided to change the nature of the roof on the building from that described in the C&L contract. They gave the contract for the new roof to another company. C&L claimed breach of contract and, pursuant to terms of their contract, took the matter to arbitration. The arbitrator awarded C&L approximately twenty-nine percent of the contract price as damages and also awarded attorney fees. C&L filed this action to confirm the award.

The Tribe defended this action by moving to dismiss because of its immunity from suit. However, the lower

court denied the Tribe's motion to dismiss and, thereafter, the Tribe generally declined to appear in the lawsuit. The lower court entered judgment confirming the arbitration award and judgment for attorney fees. The Tribe appeals largely maintaining that the trial court erred in its refusal to find it immune from suit.

Dispositive of this issue is the case of *Hoover v. Kiowa Tribe of Oklahoma*, 909 P.2d 59 (Okla. 1995). The *Hoover* court dealt with the identical issue – whether "a contract between an Indian tribe and a non-Indian is enforceable in state court when the contract is executed outside of Indian Country." *Id.* at 60; *see also First Nat'l Bank in Altus v. Kiowa, Comanche and Apache Intertribal Land Use Committee*, 913 P.2d 299 (Okla. 1996). The *Hoover* court answered the question in the affirmative.

The *Hoover* court cited favorably the New Mexico case of *Padilla v. Pueblo of Acoma*, 754 P.2d 845 (N.M. 1988), *cert. denied* 490 U.S. 1028 (1989), which also dealt with a dispute between a non-Indian roofing contractor and an Indian Tribe over roofing contract work performed on two building projects located off the reservation. The New Mexico court in *Padilla* found that the tribe was not immune from suit.

The *Hoover* court held that a "contract between an Indian tribe and a non-Indian is enforceable in state court when the contract is executed outside of Indian Country." 909 P.2d at 62. It is not disputed that, in this instance, the construction project was on newly purchased land that was neither trust nor reservation land. Thus, we conclude that *Hoover* directly controls on the issue of tribal immunity.

The Tribe also claims the lower court erred in not *sua sponte* reviewing "patent legal issues and/or examining the damage evidence." However, the Tribe admits that it raised none of these "substantive issues" in the lower court. Parties are simply not permitted to raise issues on appeal that were not raised in the trial court. *Bane v. Anderson, Bryant & Co.*, 786 P.2d 1230, 1236 (Okla. 1989). "[I]t is well settled that a litigant may not remain silent and speculate on the outcome of the trial, and then complain on appeal." *Missouri-Kansas-Texas R.R. Co. v. Callison*, 383 P.2d 696, 699 (Okla. 1963).

The Tribe also complains of the award of attorney fees, based largely on the basis of immunity – an issue we have already resolved against it. It also complains that the award was supported by "insufficient and incomplete" evidence. Once again, this was not an issue raised in the lower court. However, we note that the lower court was presented with contemporaneous time records, which support the lower court's judgment. *State ex rel. Burk v. City of Oklahoma City*, 598 P.2d 659 (Okla. 1979). Furthermore, the record indicates that purportedly unrelated legal matters were all directed at maintaining the lawsuit in the District Court of Oklahoma County and in defending that court's jurisdiction over the dispute.

The judgment of the lower court is AFFIRMED in all regards.

GOODMAN, P.J., and BOUDREAU, J., concur.

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

C & L ENTERPRISES, INC., an Oklahoma corporation,	)	
Appellee/Respondent,	)	No. 86,568
v.	)	
CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA,	)	
Appellant/Petitioner.	)	

ORDER

(Filed Mar. 3, 1997)

Appellant's motion to suspend effectiveness of the mandate is granted. The mandate shall issue, but its enforcement shall be stayed until the petition for certiorari is filed in the United States Supreme Court and for so long thereafter as certiorari proceedings are pending in that court. Appellant is directed to notify this Court or the filing of its petition for certiorari.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 3rd DAY OF MARCH, 1997.

/s/ Yvonne Kauger
CHIEF JUSTICE

KAUGER, C.J., HUGHES, LAVENDER, HARGRAVE, OPALA, and WILSON, JJ. – Concur

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IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

C & L ENTERPRISES, INC., an Oklahoma corporation,	)	
Appellee,	)	No. 86,568
v.	)	
CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA,	)	
Appellant.	)	

ORDER AND JUDGMENT ON SUPERSEDEAS BOND

(Filed Jan. 27, 1997)

Certiorari is denied. Appellee's motion for an appeal-related counsel fee is granted. 12 O.S. 1991 § 936; *Sisney v. Smalley*, Okl., 690 P.2d 1048, 1051 (1984). Following the issuance of mandate the trial court is authorized to determine the amount of the appeal-related counsel fee to be awarded to the appellee in an adversarial hearing after proper notice.

Appellee's motion for judgment on supersedeas bond is granted. Judgment is hereby rendered on the supersedeas bond against Citizen Potawatomi Nation as principal, and Mid-Continent Casualty Company, as surety, in the amount of $28,499.63 plus $11,077.39, with interest thereon at the statutory rate from October 27, 1995 and from March 21, 1996, respectively, until paid, not to

exceed the penal sum of the supersedeas bond. The district court is directed to enforce this judgment as if rendered in that court.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 27th DAY OF JANUARY, 1997.

/s/ Ralph B. Hodges
ACTING CHIEF JUSTICE

HODGES, LAVENDER, SIMMS, HARGRAVE, WILSON and WATT, JJ., concur.

OPALA, J., concur in denying certiorari; concur in part and dissent in part from the counsel-fee award judgment on supersedeas bond. The award is flawed because it does not include a certiorari-related fee. The judgment should be only against the surety.

KAUGER, C.J., SUMMERS, V.C.J., Dissent.

IN THE DISTRICT COURT WITHIN AND FOR OKLAHOMA COUNTY STATE OF OKLAHOMA

C & L ENTERPRISES INC., an Oklahoma Corporation, Plaintiff,	)	
v.	)	CASE NO. CJ 95-5204-64
CITIZEN BAND POTAWATOMI TRIBE OF OKLAHOMA a/k/a CITIZEN BAND POTAWATOMI INDIANS OF OKLAHOMA, Defendant.	)	

ORDER TAXING ATTORNEY FEES AND COSTS

(Filed March 21, 1996)

ON THIS DAY, there comes on for hearing Amended Application of Plaintiff for an order taxing attorney fees and costs, Plaintiff appearing by counsel of record and Defendant appearing not.

The Court having previously granted judgment for said Plaintiff wherein the Court ordered that Plaintiff shall recover its costs herein and a reasonable attorney's fee, pursuant to 12 O.S. § 936, and the court having further considered the statements of counsel, the applications filed herein, the time records of counsel for said Plaintiff, and the expenses incurred herein, the Court finds that the costs and attorney fees set forth below are reasonable and should be assessed against Defendant and taxed as part of the judgment herein.

IT IS THEREFORE, CONSIDERED, ORDERED, and ADJUDGED that Plaintiff, C & L ENTERPRISES

INC., shall have and recover of and from Defendant, CITIZEN BAND POTAWATOMI TRIBE OF OKLAHOMA a/k/a CITIZEN BAND POTAWATOMI INDIANS OF OKLAHOMA, the sum of $10,545.00 which the Court determines to be a reasonable attorney's fee, additional accrued costs in the sum of $532.39 and all accruing costs, to be taxed with the Judgment previously entered herein.

DATED THIS 21 DAY OF March, 1996.

/s/ Leamon Freeman
JUDGE OF THE
DISTRICT COURT

APPROVED FOR ENTRY:

GARVIN, AGEE, CARLTON & MASHBURN

BY: JOHN MASHBURN
JOHN MASHBURN, OBA #12763
Attorneys for Plaintiffs
2100 City Place
204 North Robinson
Oklahoma City, Oklahoma 73102
(405) 232-9996

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing was mailed this 21 day of March, 1995, to:

Michael Minnis, Esq.
Michael Minnis and Associates, P.C.
Liberty Tower, Suite 3160
100 North Broadway
Oklahoma City, OK 73102-8606

/s/ JOHN MASHBURN
JOHN MASHBURN

IN THE DISTRICT COURT WITHIN AND FOR OKLAHOMA COUNTY STATE OF OKLAHOMA

C & L ENTERPRISES INC., an Oklahoma Corporation, Plaintiff,	)	
v.	)	CASE NO. CJ 95-5204-64
CITIZEN BAND POTAWATOMI TRIBE OF OKLAHOMA a/k/a CITIZEN BAND POTAWATOMI INDIANS OF OKLAHOMA, Defendant.	)	

JOURNAL ENTRY OF JUDGMENT CONFIRMING ARBITRATION AWARD

(Filed Oct. 27, 1995)

ON THIS DAY, there comes on for hearing Petition of Plaintiff by Plaintiff's Motion for Confirmation of Arbitration Award, Plaintiff appearing by its attorney and Defendant appearing ~~by its attorney~~ not,

And the Court having reviewed Plaintiff's Petition filed pursuant to 15 O.S. § 815, the arbitration agreement at issue and the arbitration award entered between the parties on June 30, 1995, and Defendant not having urged vacation, modification or correction of said award within the time prescribed by 15 O.S. §§ 811-813,

The Court finds that said arbitration agreement, arbitration proceedings and arbitration award are consistent with and subject to the provisions of the Oklahoma Uniform Arbitration Act, 15 O.S. §§ 801-818 and that the Award of Arbitrator as attached to Plaintiff's Petition was

duly entered, is binding upon the parties and, for good cause shown, should be confirmed.

IT IS THEREFORE, CONSIDERED, ORDERED, and ADJUDGED by the Court that Plaintiff have and recover of and from Defendant, Judgment confirming the Award of Arbitrator attached to Plaintiff's Petition as Exhibit "B" and that Plaintiff have and recover of and from the Defendant, CITIZEN BAND POTAWATOMI TRIBE OF OKLAHOMA a/k/a CITIZEN BAND POTAWATOMI INDIANS OF OKLAHOMA, the sum of $28,414.67, with interest thereon from judgment at 8.31% per annum until paid, a reasonable attorneys' fee to be determined upon application of Plaintiff, accrued costs in the sum of $84.96, and all accruing costs.

DATED THIS 27 DAY OF OCTOBER, 1995.

/s/ Leamon Freeman
JUDGE OF THE
DISTRICT COURT

APPROVED FOR ENTRY:

GARVIN, AGEE, CARLTON & MASHBURN

BY: JOHN MASHBURN
JOHN MASHBURN – OBA# 12763
Attorneys for Plaintiff
2100 City Place
204 North Robinson
Oklahoma City, OK. 73102
(405) 232-9996

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing was mailed this 27 day of October, 1995, to:

Michael Minnis, Esq.
Michael Minnis and Associates, P.C.
Liberty Tower, Suite 3160
100 North Broadway
Oklahoma City, OK 73102-8606

/s/ JOHN MASHBURN
JOHN MASHBURN

IN THE DISTRICT COURT OF OKLAHOMA COUNTY,
STATE OF OKLAHOMA

(Filed Oct. 13, 1995)

C & L Enterprises, Inc.
Plaintiff(s)

/s/ John Mashburn
Attorney(s) for Plaintiff(s)
2100 City Place
204 N. Robinson
Okc, OK 73102
232-9996

-vs- Case No. CJ-95-5204

Citizen Band Potawatomi Tribe of Oklahoma
a/k/a Citizen Band Potawatomi Indians of Oklahoma

Defendant(s)

/s/ Michael Minnis David McCullough
Attorney(s) for Defendant(s)
3160 Liberty Tower
100 N. Broadway,
Okc, OK 73102

COURT ORDER

Date: October 13, 1995 Judge Leamon Freeman
Hearing On: Motion to Reconsider
Ruling By Court: Denied

/s/ Leamon Freeman
Judge

IN THE DISTRICT COURT OF OKLAHOMA COUNTY,
STATE OF OKLAHOMA

(Filed Sep. 22, 1995)

C & L Enterprises, Inc.
Plaintiff(s)

/s/ John Mashburn
Attorney(s) for Plaintiff(s)
2100 City Place
Okc, OK 73102
232-9996

-vs-

Case No. CJ-95-5204-64

Citizen Band Potawatomi Tribe

Defendant(s)

/s/ Michael Minnis
Attorney(s) for Defendant(s)
3160 Liberty Tower
Okc, [sic] 73102
235-7686

COURT ORDER

Date: 9/22/95 Judge _____
Hearing On: Motion to Dismiss
Ruling By Court: Overruled, Defendant granted 20 days to answer.

/s/ Leamon Freeman
Judge

IN THE DISTRICT COURT WITHIN AND FOR
OKLAHOMA COUNTY STATE OF OKLAHOMA

C & L ENTERPRISES, INC.,

Plaintiff,

v. Case No. CJ-95-5204-64

CITIZEN BAND POTAWATOMI TRIBE
OF OKLAHOMA a/k/a CITIZEN BAND
POTAWATOMI INDIANS OF OKLAHOMA.

MOTION TO DISMISS
(Filed Aug. 25, 1995)

COMES NOW the Citizen Band Potawatomi Indian Tribe of Oklahoma ("Potawatomi"), appearing specially, and moves the court to enter an order dismissing the "Petition for Confirmation of Arbitration Award" (August 7, 1995) filed herein on the basis that this court lacks jurisdiction over the person of the "Potawatomi", that the Potawatomi lack the capacity to be sued, or, alternatively, that the service of process was insufficient. 12 O.S. 1991, § 2012, ¶¶ B.2, B.9 and B.5. Consistent with District Court Rule 4, this motion is accompanied by a concise brief.

MICHAEL MINNIS & ASSOCIATES, P.C.

By /s/ Michael Minnis
Michael Minnis, OBA #6251
David McCullough,
OBA #10898
3160 Liberty Tower
100 North Broadway
Oklahoma City, OK 73102
(405) 235-7686
ATTORNEYS FOR CITIZENS BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of August, 1995, a true and correct copy of the above and foregoing was mailed, postage prepaid, to:

John Mashburn
2100 City Place
204 North Robinson
Oklahoma City, OK 73102

ATTORNEY FOR PLAINTIFF

/s/ Michael Minnis
Michael Minnis
David McCullough

IN THE DISTRICT COURT WITHIN AND FOR OKLAHOMA COUNTY STATE OF OKLAHOMA

C & L ENTERPRISES INC., an Oklahoma Corporation, Plaintiff,	)	CASE NO. CJ-95-5204-64
v.	)	
CITIZEN BAND POTAWATOMI TRIBE OF OKLAHOMA a/k/a CITIZEN BAND POTAWATOMI INDIANS OF OKLAHOMA, Defendant.	)	

PETITION
FOR CONFIRMATION OF ARBITRATION AWARD

(Filed Aug. 7, 1995)

COMES NOW Plaintiff and for its cause of action against the Defendant and pursuant to 15 O.S. § 815, respectfully states and alleges the following:

1. On August 25, 1993, the parties entered into a contract, executed within the State of Oklahoma, whereby Plaintiff was to surface the roof of a building for The First Oklahoma Bank, in Shawnee, Oklahoma. A true and correct copy of said contract is attached hereto as Exhibit "A" and incorporated herein.

2. Said contract was executed, for Defendant, by three officers of the Defendant including the Defendant's Chairman, John A. Barrett, Jr., its Secretary Treasurer, Bob Davis, and one other currently unidentified officer.

3. Said officers had actual and/or apparent authority to bind Defendant upon said contract.

4. The land which is the subject of the construction contract at issue herein, although currently owned by the Defendant, is neither Indian reservation nor "trust" land and was not validly set apart for the use of the Defendant as such under the superintendence of the Federal Government.

5. Plaintiff believes and therefore alleges that Defendant obtained or used funds for construction of the above-referenced bank which were non-tribe funds; *for example,* Economic Development Grant or other government grant funds.

6. In the event "Tribal Sovereignty" could have otherwise attached to the transactions between the parties, which Plaintiff denies, such sovereignty was waived by Defendant pursuant to the terms of the contract whereby the parties agreed to submit any claims or disputes to arbitration and further agreed that the award rendered by the arbitrator would be final, and judgment could be entered upon it in accordance with applicable law in any court having jurisdiction thereof, all as set forth at Article 10.8 in Exhibit "A."

7. Plaintiff complied with the terms of said contract and presented its demand for arbitration upon the breach of Defendant.

8. On June 30, 1995, after receiving the written statements and documents of the parties and having heard the evidence presented, the Arbitrator duly rendered an award for the Plaintiff as set forth in Exhibit "B" which is attached hereto and incorporated herein.

9. Said arbitration agreement, arbitration proceedings and arbitration award are consistent with an subject to the provisions of the Oklahoma Uniform Arbitration Act, 15 O.S. §§ 801 - 818.

10. Jurisdiction is proper with this Court by reason of execution of said contract within Oklahoma and by application of 15 O.S. § 802.B.

11. Venue is proper with this Court by virtue of Defendant's waiver of venue in Article 10.8 of Exhibit "A," and pursuant to the requirements of 15 O.S. § 816 as the arbitration hearing occurred in Oklahoma County, Oklahoma.

12. Defendant has wholly failed and refused to pay said Arbitration Award thereby necessitating the filing of this action for which Plaintiff is entitled to additional attorney's fees and costs.

WHEREFORE, Plaintiff prays that the Court enter Judgment confirming the Arbitration Award attached hereto as Exhibit "B" and that Plaintiff have and recover of and from the Defendant, CITIZEN BAND POTAWATOMI TRIBE OF OKLAHOMA a/k/a CITIZEN BAND POTAWATOMI INDIANS OF OKLAHOMA, the sum of $28,414.67, with interest thereon from judgment according to law, a reasonable attorneys' fee and all costs of this action.

GARVIN, AGEE, CARLTON
& MASHBURN

BY: /s/ John Mashburn
JOHN MASHBURN –
OBA# 12763
Attorneys for Plaintiff
2100 City Place
204 North Robinson
Oklahoma City, OK. 73102
(405) 232-9996

PLAINTIFF'S
EXHIBIT
A

AIA Document A107

Abbreviated Form of Agreement
Between Owner and Contractor

For CONSTRUCTION PROJECTS OF LIMITED SCOPE where the Basis of Payment is a STIPULATED SUM

1987 EDITION

THIS DOCUMENT HAS IMPORTANT LEGAL CONSEQUENCES; CONSULTATION WITH AN ATTORNEY IS ENCOURAGED WITH RESPECT TO ITS COMPLETION OR MODIFICATION.

This document includes abbreviated General Conditions and should not be used with other general conditions. It has been approved and endorsed by The Associated General Contractors of America.

AGREEMENT

made as of the Twenty-Fifth day of August in the year of Nineteen Hundred and Ninety-Three

BETWEEN the Owner: Citizen Band Potawatomi
(Name and address) Tribe of Oklahoma
1901 South Gordon Cooper Drive
Shawnee, Oklahoma 74801

and the Contractor: C & L Enterprises Inc.
(Name and address) P.O. Box 406
Lindsay, Oklahoma 73052

The Project is: *(Name and location)*	The Building for The First Oklahoma Bank Shawnee, Oklahoma Project Number 9202
The Architect is: *(Name and address)*	Price Group Architects and Planners 14 East 9th Shawnee, Oklahoma 74801 273-2200

The Owner and Contractor agreed as set forth below.

Don Dunning
Mobil – 620-1590

660-5700-
PAGER

Call Don on Ap 25 11:30

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ARTICLE 1

THE WORK OF THIS CONTRACT

1.1 The Contractor shall execute the entire Work described in the Contract Documents, except to the extent

specifically indicated in the Contract Documents to be the responsibility of others, or as follows:

Furnish roofing consisting of Perlite Board Foam Insulation, 1 Inch, 52 Mils Neogard 70613 Series Coating, Five Year Warranty, One Year Defect Bond, Eleven (11) RoofDrains, Cap Flashing.

See Attachment #1

ARTICLE 2

DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION

2.1 The date of commencement is the date from which the Contract Time of Paragraph 2.2 is measured, and shall be the date of this Agreement, as first written above, unless a different date is stated below or provision is made for the date to be fixed in a notice to proceed issued by the Owner.

(Insert the date of commencement if it differs from the date of this Agreement or if applicable, state that the date will be fixed in a notice to proceed.)

Date will be fixed per notice to proceed.

2.2 The Contract shall achieve Substantial Completion of the entire Work not later than

(Insert the calendar date or number of calendar days after the date of commencement. Also insert any requirements for earlier Substantial Completion of certain portions of the Work, if not stated elsewhere in the Contract Documents.)

Per construction managers schedules.

subject to adjustment of the Contract Time as provided in the Contract Documents.

(Insert provisions, if any for liquidated damages relating to failure to complete on time.)

ARTICLE 3

CONTRACT SUM

3.1 The Owner shall pay the Contractor in current funds for the Contractor's performance of the Contract the Contract Sum of Eighty-Five Thousand Dollars ($85,000.00), subject to additions and deductions as provided in the Contract Documents.

3.2 The Contract Sum is based upon the following alternates. If any, which are described in the Contract Documents and are hereby accepted by the Owner:

(State the numbers or other identification of accepted alternates. If decisions on other alternates are to be made by the Owner subsequent to the execution of this Agreement, attach a schedule of such other alternates showing the amount for each and the date until which that amount is valid.)

Not applicable

3.3 Unit prices, if any, are as follows:

None

ARTICLE 4

PROGRESS PAYMENTS

4.1 Based upon Applications for Payments submitted to the Architect by the Contractor and Certificates for Payment issued by the Architect, the Owner shall make progress payments on account of the Contract Sum to the Contractor as provided below and elsewhere in the Contract Documents. The period covered by each Application for Payment shall be one calendar month ending on the last day of the month, or as follows:

> Applications for payment to be submitted on or before the 25th day of each month. Payment of said application due on or before the 5th day of the following month.

4.2 Payments due and unpaid under the Contract shall bear interest from the date payment is due at the rate stated below, or in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located.

(Insert rate of interest agreed upon, if any.)

(Usury laws and requirements under the Federal Truth in Lending Act, similar state and local consumer credit laws and other regulations at the Owner's and Contractor's principal places of business. The location of the project and elsewhere may affect the validity of this provision. Legal advice should be obtained with respect to deletions or modifications, and also regarding requirements such as written disclosures or waivers.)

ARTICLE 5

FINAL PAYMENT

5.1 Final payment, constituting the entire unpaid balance of the Contract Sum, shall be made by the Owner to the Contractor when the Work has been completed, the Contract fully performed, and a final Certificate for Payment has been issued by the Architect.

ARTICLE 6

ENUMERATION OF CONTRACT DOCUMENTS

6.1 The Contract Documents are listed in Article 7 and, except for Modifications issued after execution of this Agreement, are enumerated as follows:

6.1.1 The Agreement is this executed Abbreviated Form of Agreement Between Owner and Contractor, AIA Document A107, 1987 Edition.

6.1.2 The Supplementary and other Conditions of the Contract are those contained in the Project Manual dated ___, and are as follows:

Document ___ Title ___ Pages ___

Per Plans and Specifications.

6.1.3. The Specifications are those contained in the Project Manual dated as in Subparagraph 6.1.2., and are as follows:

(Either list the Specifications here or refer to an exhibit attached to this Agreement.)

Section ___ Title ___ Pages ___

Per Plans and Specifications.

6.1.4 The Drawings are as follows, and are dated ___ unless a different date is shown below:

(Either list the Drawings here or refer to an exhibit attached to this Agreement.)

Number ___ Title ___ Date ___

Per Plans and Specifications.

6.1.5 The Addenda, if any, are as follows.

Number ___ Date ___ Pages ___

Portions of Addenda relating to bidding requirements are not part of the Contract Documents unless the bidding requirements are also enumerated in this Article 6.

6.1.6 Other documents, if any, forming part of the Contract Documents are as follows:

(List any additional documents which are intended to form part of the Contract Documents.)

GENERAL CONDITIONS

ARTICLE 7

CONTRACT DOCUMENTS

7.1 The contract documents consist of this Agreement with Conditions of the Contract (General, Supplementary and other Conditions). Drawings, Specifications, addenda issued prior to the execution of this Agreement, other documents listed in this Agreement and Modifications issued after execution of this Agreement. The intent of

the Contract Documents is to include all items necessary for the proper execution and completion of the Work by the Contractor. The Contract Documents are complementary, and what is required by one shall be as binding as if required by all; performance by the Contractor shall be required only to the extent consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the intended results.

7.2 The Contract Documents shall not be construed to create a contractual relationship of any kind (1) between the Architect and Contractor, (2) between the Owner and a Subcontractor or Sub-subcontractor or (3) between any persons or entities other than the Owner and Contractor.

7.3 Execution of the Contract by the Contractor is a representation that the Contractor has visited the site and become familiar with the local conditions under which the Work is to be performed.

7.4 The term "Work" means the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor's obligations. The Work may constitute the whole or a part of the Project.

ARTICLE 8

OWNER

8.1 The Owner shall furnish surveys and a legal description of the site.

8.2 Except for permits and fees which are the responsibility of the Contractor under the Contract Documents, the Owner shall secure and pay for necessary approvals, easements, assessments and charges required for the construction, use or occupancy of permanent structures or permanent changes in existing facilities.

8.3 If the Contractor fails to correct Work which is not in accordance with the requirements of the Contract Documents or persistently fails to carry out the Work in accordance with the Contract Documents, the Owner, by a written order, may order the Contractor to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, the right of the Owner to stop the Work shall not give rise to a duty on the part of the Owner to exercise this right for the benefit of the Contractor or any other person or entity.

ARTICLE 9

CONTRACTOR

9.1 The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless Contract Documents give other specific instructions concerning these matters.

9.2 Unless otherwise provided in the Contract Documents, the Contractor shall provide and pay for labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for the proper execution

and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work.

9.3 The Contractor shall enforce strict discipline and good order among the Contractor's employees and other persons carrying out the Contract. The Contractor shall not permit employment of unfit persons or persons not skilled in tasks assigned to them.

9.4 The Contractor warrants to the Owner and Architect that materials and equipment furnished under the Contract will be of good quality and new unless otherwise required or permitted by the Contract Documents, that the Work will be free from defects not inherent in the quality required or permitted, and that the Work will conform with the requirements of the Contract Documents. Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective. The Contractor's warranty excludes remedy for damage or defect caused by abuse, modifications not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear under normal usage. If required by the Architect, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

9.5 Unless otherwise provided in the Contract Documents, the Contractor shall pay sales, consumer use, and other similar taxes which are legally enacted when bids are received or negotiations concluded, whether or not yet effective or merely scheduled to go into effect, and shall secure and pay for the building permit and other

permits and governmental fees, licenses and inspections necessary for proper execution and completion of the Work.

9.6 The Contractor shall comply with and give notices required by laws, ordinances, rules, regulations, and lawful orders of public authorities bearing on performance of the Work. The Contractor shall promptly notify the Architect and Owner if the Drawings and Specifications are observed by the Contractor to be at variance therewith.

9.7 The Contractor shall be responsible to the Owner for the acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons performing portions of the Work under a contract with the Contractor.

9.8 The Contractor shall review, approve, and submit to the Architect Shop Drawings, Product Data, Samples and similar submittals required by the Contract Documents with reasonable promptness. The Work shall be in accordance with approved submittals. When professional certification of performance criteria materials, systems or equipment is required by the Contract Documents, the Architect shall be entitled to rely upon the accuracy and completeness of such certifications.

9.9 The Contractor shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations under the Contract. At completion of the Work the Contractor shall remove from and about the Project waste materials, rubbish, the Contractor's tools, construction equipment, machinery and surplus materials.

9.10 The Contractor shall provide the Owner and Architect access to the Work in preparation and progress wherever located.

9.11 The Contractor shall pay all royalties and license fees; shall defend suits or claims for infringement of patent rights and shall hold the Owner harmless from loss on account thereof, but shall not be responsible for such defense or loss when a particular design, process or product of a particular manufacturer or manufacturers is required by the Contract Documents unless the Contractor has reason to believe that there is an infringement of patent.

9.12 To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including loss of use resulting therefrom, but only to the extent caused in whole or in part by negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 9.12.

9.12.1 In claims against any person or entity indemnified under this Paragraph 9.12 by an employee of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under this Paragraph 9.12 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Contractor or a Subcontractor under workers or workmen's compensation acts, disability benefit acts or other employee benefit acts.

9.12.2 The obligations of the Contractor under this Paragraph 9.12 shall not extend to the liability of the Architect, the Architect's consultants, and agents and employees of any of them arising out of (1) the preparation or approval of maps, drawings, opinions, reports, surveys, Change Orders, Construction Change Directives, designs or specification, or (2) the giving of or the failure to give directions or instructions by the Architect, the Architect's consultants, and agents and employees of any of them provided such giving or failure to give is the primary cause of the injury or damage.

ARTICLE 10

ADMINISTRATION OF THE CONTRACT

10.1 The Architect will provide administration of the Contract and will be the Owner's representative (1) during construction, (2) until final payment is due and (3) with the Owner's concurrence, from time to time during the correction period described in Paragraph 18.1.

10.2 The Architect will visit the site at intervals appropriate to the stage of construction to become generally

familiar with the progress and quality of the completed Work and to determine in general if the Work is being performed in a manner indicating that the Work, when completed, will be in accordance with the Contract Documents. However, the Architect will not be required to make exhaustive or continuous on-site inspections to check quality or quantity of the Work. On the basis of on-site observations as an architect, the Architect will keep the Owner informed of progress of the Work and will endeavor to guard the Owner against defects and deficiencies in the Work.

10.3 The Architect will not have control over or charge of and will not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, since these are solely the Contractor's responsibility as provided in Paragraphs 9.1 and 16.1. The Architect will not be responsible for the Contractor's failure to carry out the Work in accordance with the Contract Documents.

10.4 Based on the Architect's observations and evaluations of the Contractor's Applications for Payment, the Architect will review and certify the amounts due the Contractor and will issue Certificates for Payment in such amounts.

10.5 The Architect will interpret and decide matters concerning performance under and requirements of the Contract Documents on written request of either the Owner or Contractor. The Architect will make initial decisions on all claims, disputes or other matters in question between the Owner and Contractor, but will not be liable for

results of any interpretations or decisions rendered in good faith. The Architect's decisions in matters relating to aesthetic effect will be final if consistent with the intent expressed in the Contract Documents. All other decisions of the Architect, except those which have been waived by making or acceptance or final payment, shall be subject to arbitration upon the written demand of either party.

10.6 The Architect will have authority to reject Work which does not conform to the Contract Documents.

10.7 The Architect will review and approve or take other appropriate action upon the Contractor's submittals such as Shop Drawings. Product Data and Samples, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents.

10.8 All claims or disputes between the Contractor and the Owner arising out or relating to the Contract, or the breach thereof, shall be decided by arbitration in accordance with the Construction industry Arbitration Rules of the American Arbitration Association currently in effect unless the parties mutually agree otherwise and subject to an initial presentation of the claim or dispute to the Architect as required under Paragraph 10.5. Notice of the demand for arbitration shall be filed in writing with the other party to this Agreement and with the American Arbitration Association and shall be made within a reasonable time after the dispute has arisen. The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof. Except by written consent of the person or entity sought

to be joined, no arbitration arising out of or relating to the Contract Documents shall include, by consolidation, joinder or in any other manner, any person or entity not a party to the Agreement under which such arbitration arises, unless it is shown at the time the demand for arbitration is filed that (1) such person or entity is substantially involved in a common question of fact or law, (2) the presence of such person or entity is required if complete relief is to be accorded in the arbitration, (3) the interest or responsibility of such person or entity in the matter is not insubstantial, and (4) such person or entity is not the Architect or any of the Architect's employees or consultants. The agreement herein among the parties to the Agreement and any other written agreement to arbitrate referred to herein shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

ARTICLE 11

SUBCONTRACTS

11.1 A subcontractor is a person or entity who has a direct contract with the Contractor to perform a portion of the Work at the site.

11.2 Unless otherwise stated in the Contract Documents or the bidding requirements, the Contractor, as soon as practicable after award of the Contract, shall furnish in writing to the Owner through the Architect the names of the Subcontractors for each of the principal portions of the Work. The Contractor shall not contract with any Subcontractor to whom the Owner or Architect has made reasonable and timely objection. The Contractor shall not

be required to contract with anyone to whom the Contractor has made reasonable objection. Contracts between the Contractor and Subcontractors shall (1) require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by the terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities which the Contractor, by the Contract Documents, assumes toward the Owner and Architect, and (2) allow to the Subcontractor the benefit of all rights, remedies and redress afforded to the Contractor by these Contract Documents.

ARTICLE 12

CONSTRUCTION BY OWNER OR BY SEPARATE CONTRACTORS

12.1 The Owner reserves the right to perform construction or operations related to the Project with the Owner's own forces, and to award separate contracts in connection with other portions of the Project or other construction or operations on the site under conditions of the contract identical or substantially similar to these, including those portions related to insurance and waiver of subrogation. If the Contractor claims that delay or additional cost is involved because of such action by the Owner, the Contractor shall make such claim as provided elsewhere in the Contract Documents.

12.2 The Contractor shall afford the Owner and separate contractors reasonable opportunity for the introduction

and storage of their materials and equipment and performance of their activities, and shall connect and coordinate the Contractor's construction and operations with theirs as required by the Contract Documents.

12.3 Costs caused by delays, improperly timed activities or defective construction shall be borne by the party responsible therefor.

ARTICLE 13

CHANGES IN THE WORK

13.1 The Owner, without invalidating the Contract, may order changes in the Work consisting of additions, deletions or modifications, the Contract Sum and Contract Time being adjusted accordingly. Such changes in the Work shall be authorized by written Change Order signed by the Owner, Contractor and Architect, or by written Construct Change Directive signed by the Owner and Architect.

13.2 The Contract Sum and Contract Time shall be changed only by Change Order.

13.3 The cost or credit to the Owner from a change in the Work shall be determined by mutual agreement.

ARTICLE 14

TIME

14.1 Time limits stated in the Contract Documents are of the essence of the Contract. By executing the Agreement the Contractor confirms that the Contract Time is a reasonable period for performing the Work.

14.2 The date of Substantial Completion is the date certified by the Architect in accordance with Paragraph 15.3.

14.3 If the Contractor is delayed at any time in progress of the Work by changes ordered in the Work, by labor disputes, fire, unusual delay in deliveries, abnormal adverse weather conditions not reasonably anticipatable, unavoidable casualties or any causes beyond the Contractor's control, or by other causes which the Architect determines may justify delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.

ARTICLE 15
PAYMENTS AND COMPLETION

15.1 Payments shall be made as provided in Articles 4 and 5 of this Agreement.

15.2 Payments may be withheld on account of (1) defective Work not remedied, (2) claims filed by third parties, (3) failure of the Contractor to make payments properly to Subcontractors or for labor, materials or equipment, (4) reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Sum, (5) damage to the Owner or another contractor, (6) reasonable evidence that the Work will not be completed within the Contract Time and that the unpaid balance would not be adequate to cover actual or liquidated damages for the anticipated delay, or (7) persistent failure to carry out the Work in accordance with the Contract Documents.

15.3 When the Architect agrees that the Work is substantially complete, the Architect will issue a Certificate of Substantial Completion.

15.4 Final payment shall not become due until the Contractor has delivered to the Owner a complete release of all liens arising out of this Contract or receipts in full covering all labor, materials and equipment for which a lien could be filed, or a bond satisfactory to the Owner to indemnify the Owner against such lien. If such lien remains unsatisfied after payments are made, the Contractor shall refund to the Owner all money that the Owner may be compelled to pay in discharging such lien, including all costs and reasonable attorneys' fees.

15.5 The making of final payment shall constitute a waiver of claims by the Owner except those arising from:

.1 liens, claims, security interests or encumbrances arising out of the Contract and unsettled;

.2 failure of the Work to comply with the requirements of the Contract Documents; or

.3 terms of special warranties required by the contract documents.

Acceptance of final payment by the Contractor, a Subcontractor or material supplier shall constitute a waiver of claims by the payee except those previously made in writing and identified by that payee as unsettled at the time of final Application for Payment.

ARTICLE 16

PROTECTION OF PERSONS AND PROPERTY

16.1 The Contractor shall be responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the performance of the Contract. The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to:

.1 employees on the Work and other persons who may be affected thereby;

.2 the Work and materials and equipment to be incorporated therein; and

.3 other property at the site or adjacent thereto.

The Contractor shall give notices and comply with applicable laws, ordinances, rules, regulations and lawful orders of public authorities bearing on safety of persons and property and their protection from damage, injury or loss. The Contractor shall promptly remedy damage and loss to property at the site caused in whole or in part by the Contractor, a Subcontractor, a Sub-subcontractor, or anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable and for which the Contractor is responsible under Subparagraphs 16.1.2 and 16.1.3, except for damage or loss attributable to acts or omissions of the Owner or Architect or by anyone for whose acts either of them may be liable, and not attributable to the fault or negligence of the Contractor. The foregoing obligations of the Contractor are in addition to the Contractor's obligations under Paragraph 9.12.

16.2 The Contractor shall not be required to perform without consent any Work relating to asbestos or polychlorinated biphenyl (PCB).

ARTICLE 17
INSURANCE

17.1 The Contractor shall purchase from and maintain in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located insurance for protection from claims under workers' or workmen's compensation acts and other employee benefit acts which are applicable, claims for damages because of bodily injury, including death, and from claims for damages, other than to the Work itself, to property which may arise out of or result from the Contractor's operations under the Contract, whether such operations be by the Contractor or by a Subcontractor or anyone directly or indirectly employed by any of them. This insurance shall be written for not less than limits of liability specified in the Contract Documents or required by law, whichever coverage is greater, and shall include contractual liability insurance applicable to the Contractor's obligations under Paragraph 9.12. Certificates of such insurance shall be filed with the Owner prior to the commencement of the Work.

17.2. The Owner shall be responsible for purchasing and maintaining the Owner's usual liability insurance. Optionally, the Owner may purchase and maintain other insurance for self-protection against claims which may arise from operations under the Contract. The Contractor shall not be responsible for purchasing and maintaining

this optional Owner's liability insurance unless specifically required by the Contract Documents.

17.3 Unless otherwise provided, the Owner shall purchase and maintain, in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located, property insurance upon the entire Work at the site to the full insurable value thereof. This insurance shall be on an all-risk policy form and shall include interests of the Owner, the Contractor, Subcontractors and Sub-subcontractors in the Work and shall insure against the perils of fire and extended coverage and physical loss or damage including, without duplication of coverage, theft, vandalism and malicious mischief.

17.4. A loss insured under Owner's property insurance shall be adjusted with the Owner and made payable to the Owner as fiduciary for the insureds, as their interests may appear, subject to the requirements of any applicable mortgagee clause.

17.5 The Owner shall file a copy of each policy with the Contractor before an exposure to loss may occur. Each policy shall contain a provision that the policy will not be cancelled or allowed to expire until at least 30 days' prior written notice has been given to the Contractor.

17.6 The Owner and Contractor waive all rights against each other and the Architect, Architect's consultants, separate contractors described in Article 12, if any, and any of their subcontractors, sub-subcontractors, agents and employees, for damages caused by fire or other perils to the extent covered by property insurance obtained pursuant to this Article 17 or any other property insurance applicable to the Work, except such rights as they may

have to the proceeds of such insurance held by the Owner as fiduciary. The Contractor shall require similar waivers in favor of the Owner and the Contractor by Subcontractors and Sub-subcontractors. The Owner shall require similar waivers in favor of the Owner and Contractor by the Architect, Architect's consultants, separate contractors described in Article 12, if any, and the subcontractors, sub-subcontractors agents and employees of any of them.

ARTICLE 18

CORRECTION OF WORK

18.1. The Contractor shall promptly correct Work rejected by the Architect or failing to conform to the requirements of the Contract Documents, whether observed before or after Substantial Completion and whether or not fabricated, installed or completed, and shall correct any Work found to be not in accordance with the requirements of the Contract Documents within a period of one year from the date of Substantial Completion of the Contract or by terms of an applicable special warranty required by the Contract Documents. The provisions of this Article 18 apply to Work done by Subcontractors as well as to Work done by direct employees of the Contractor.

18.2 Nothing contained in this Article 18 shall be construed to establish a period of limitation with respect to other obligations which the Contractor might have under the Contract Documents. Establishment of the time period of one year as described in Paragraph 18.1 relates only to the specific obligation of the Contractor to correct

the Work, and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Contractor's liability with respect to the Contractor's obligations other than specifically to correct the Work.

ARTICLE 19

MISCELLANEOUS PROVISIONS

19.1 The Contract shall be governed by the law of the place where the Project is located.

19.2 As between the Owner and the Contractor, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued:

.1 not later than the date of Substantial Completion for acts or failures to act occurring prior to the relevant date of Substantial Completion:

.2 not later than the date of issuance of the final Certificate for Payment for acts or failures to act occurring subsequent to the relevant date of Substantial Completion and prior to issuance of the final Certificate for Payment; and

.3 not later than the date of the relevant act or failure to act by the Contractor for acts or failures to act occurring after the date of the final Certificate for Payment.

ARTICLE 20

TERMINATION OF THE CONTRACT

20.1 If the Architect fails to recommend payment for a period of 30 days through no fault of the Contractor, or if the Owner fails to make payment thereon for a period of 30 days, the Contractor may, upon seven additional days' written notice to the Owner and the Architect, terminate the Contract and recover from the Owner payment for Work executed and for proven loss with respect to materials, equipment, tools, and construction equipment and machinery, including reasonable overhead, profit and damages applicable to the Project.

20.2 If the Contractor defaults or persistently fails or neglects to carry out the Work in accordance with the Contract Documents or fails to perform a provision of the Contract, the Owner, after seven days' written notice to the Contractor and without prejudice to any other remedy the Owner may have, may make good such deficiencies and may deduct the cost thereof, including compensation for the Architect's services and expenses made necessary thereby, from the payment then or thereafter due the Contractor. Alternatively at the Owner's option, and upon certification by the Architect that sufficient cause exists to justify such action, the Owner may terminate the Contract and take possession of the site and of all materials, equipment, tools, and construction equipment and machinery thereon owned by the Contractor and may finish the Work by whatever method the Owner may deem expedient. If the unpaid balance of the Contract Sum exceeds costs of finishing the Work, including compensation for the Architect's services and expenses

made necessary thereby, such excess shall be paid to the Contractor, but if such costs exceed such unpaid balance, the Contractor shall pay the difference to the Owner.

ARTICLE 21

OTHER CONDITIONS OR PROVISIONS

Attachment Page 1.

This Agreement entered into as of the day and year first written above.

OWNER /s/ John A. Barrett, Jr. CONTRACTOR

/s/ Bob F. Davis Sec/Trea.
(Signature)

/s/ Lynn D. Scruggs
(Signature)

/s/ Hilton L. Melot
(Printed name and title)

C & L Enterprises Inc.
(Printed name and title)

[LOGO] Caution: You should sign an original AIA document which has this caution printed in red. An original assures that changes will not be obscured as may occur when documents are reproduced.

PROPOSAL

P.O. Box 406
Lindsay OK 73052
Lynn Scruggs 756-8415

No.
Date July 25, 93
Sheet No.

Proposal Submitted To:

Name Pottawatomi Tribe
Street 1901 S. Gordon
Cooper Drive
City Shawnee, OK 74801
State
Phone Mr. Don Dunning
275-3121

Work To Be Performed At:

RE: First Oklahoma Bank
Street
City State
Date of Plans
Architect
Fax 335-0198

We hereby propose to furnish the materials and perform the labor necessary for the completion of

Roof on Bank – Project #9202 – The Price Group

Roof Bid – Perlite Board, Foam Insulation, 1 inch
52 Mils Neosard - 70613 Series Coating
Five Year Warranty
One Year Defect Bond
11 Roof Drains
Cap Flashing

All material is guaranteed to be as specified, and the above work to be performed in accordance with the drawings and specifications submitted for above work and completed in a substantial workmanlike manner for the sum of Eighty Five thousand dollars Dollars ($ 85,000).

with payments to be made as follows: _____

Any alteration or deviation from above specifications involving extra costs, will be executed only upon written orders, and will become an extra charge over and above the estimate. All agreements contingent upon strikes, accidents or delays beyond our control. Owner to carry fire, tornado and other necessary insurance upon above work. Workmen's compensation and Public Liability insurance on above work to be taken out by

Respectfully submitted
/s/ Lynn W. Scruggs
Per /s/ Lynn W. Scruggs

Note – This proposal may be withdrawn by us if not accepted within ___ days.

ACCEPTANCE OF PROPOSAL

The above prices, specifications and conditions are satisfactory and are hereby accepted. You are authorized to do the work as specified. Payment will be made as outlined above.

Date

Signature

Signature

PLAINTIFF'S EXHIBIT B

AMERICAN ARBITRATION ASSOCIATION

CONSTRUCTION INDUSTRY ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

Re: 71 E 110 00024 95
C & L Enterprises, Inc.
vs.
Citizen Band Potawatomi Tribe of Oklahoma
Oklahoma City, OK

ADMINISTRATOR: Tracey L. Hegeman

AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into by the parties, and dated August 25, 1993, and having been duly sworn and having duly heard the proofs and allegations of C & L Enterprises, Inc. ("C & L"), and Citizen Band Potawatomi Tribe of Oklahoma ("Potawatomi") having failed to appear after due notice by mail in accordance with the Commercial Arbitration Rules of the American Arbitration Association ("Association"), hereby, AWARD, as follows:

Potawatomi shall pay to C & L the sum of Twenty Five Thousand Four Hundred Dollars and No Cents ($25,400.00).

Potawatomi shall pay to C & L the sum of Two Thousand Two Hundred Thirty Dollars and No Cents ($2,230.00) for attorney's fees.

Potawatomi shall pay to C & L the sum of Thirty Four Dollars and Sixty Seven Cents ($34.67) for attorney's costs.

The administrative fees of the American Arbitration Association totaling $763.00 shall be borne by Potawatomi. Therefore, Potawatomi shall pay to C & L the sum of $750.00 representing that portion of C & L's share of administrative fees previously paid to the Association. Potawatomi shall pay to the Association the sum of $13.00 representing that portion of Potawatomi's share of administrative expenses still due the Association.

The above sums are to be paid on or before thirty (30) days from the date of this Award.

This Award is in full settlement of all claims submitted in this Arbitration. All claims not expressly granted herein are, hereby, denied.

DATE: June 30, 1995

SIGNED: /s/ Peter B. Bradford
Peter B. Bradford, Arbitrator